

**UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, NW
WASHINGTON, DC 20001-8002**

Date: 01/29/97

Case No. 95-INA-47

In the Matter of:

Hector Zazueta
Employer,

on behalf of

Hector Javier Zazueta
Alien.

Before: Holmes, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(C).

Statement of the Case

On January 11, 1993, Hector Zazueta, Employer, filed an application for alien employment certification to enable Hector Javier Zazueta, Alien, to fill the position of Thoroughbred Race Horse Groom. The duties of the job were described as follows:

Attends to overall care of horses, maintains stalls and tack; disinfects stalls and

bedding; does the cleaning, brushing and trimming of horse; administers medicine as needed and inspects and observes the horses [sic] physical condition.

Accompanies horses to race track or other places as needed. Responsible for the safety of the horses and nearby workers. Opportunity to earn winnings bonus in addition to guaranteed wage.

Employer required that applicants have a sixth grade education and two years of experience in the job offered. (AF. 44) It was also specified that the job required a split work shift because of training and racing schedules.

The CO issued a Notice of Findings (NOF) proposing to deny certification on November 29, 1993. (AF. 40-42). The CO stated that there was no clear opening for U.S. workers; that the Employer and the Alien appeared to be one and the same. The CO specified evidence that Employer should submit in rebuttal.

The CO further stated that Employer had not made a good faith effort to recruit U.S. workers; that Employer had waited four to five weeks after receiving resumes of two qualified U.S. applicants to contact the applicants. The CO also stated that Employer had failed to provide his telephone number in the letters sent to the applicants.

Employer, by counsel, submitted rebuttal dated January 13, 1994. (AF. 20-21) Counsel stated that the Alien is Employer's son; that the Alien has no interest in the business; and that Employer needs someone now and will hire whoever is qualified. Counsel further stated that the resumes of the two U.S. applicants were received by Employer on April 19, 1993 and that letters were sent to applicants Garcia and Shulman on May 13 and 17, 1993, respectively. Counsel further stated that both applicants worked at the same race track as Employer and could have contacted Employer at anytime.

Counsel further stated that there was no need to provide Employer's telephone number to the applicants because they could talk to Employer any morning; that both applicants responded to other newspaper job ads and trainer's letters, but did not respond to Employer's letters. Counsel concluded that it was obvious that they did not want to work for Employer.

The CO issued s Supplemental NOF on March 9, 1994. (AF. 37-39) The CO stated that Employer's rebuttal failed to explain the delay of more than four weeks in contacting the U.S. applicants. The CO also stated that applicant Garcia responded to a state employment development department (EDD) questionnaire stating that he contacted Employer on the day he received Employer's letter and that he gave Employer additional information about himself, but heard nothing further from Employer; that applicant Garcia had found other employment.

The CO further stated that the applicants could not have contacted Employer until after receiving Employer's letter because until that time, they did not know Employer's identity.

Employer, by counsel, submitted additional rebuttal on April 13, 1994. (AF. 7-8) Counsel

stated that applicant Garcia did not respond, but responded to other job ads and trainer's letters; and that he had previously lied about Employer contacts which were subsequently proven by telephone records. Counsel further stated that applicant Shulman had been contacted in less than four weeks after receipt of the EDD referral letter and that she did not contact Employer.

The CO issued a Final Determination (FD) on May 24, 1994. (AF. 3-4) The CO stated that Employer had failed to explain the delay in contacting U.S. applicants after receipt of the referral letters from EDD. The CO stated that such delays are discouraging to applicants who make other job plans and that unavailability of an applicant at a later date does not establish that they were unavailable at the time of initial recruitment and referral.

Employer, by counsel, requested review of the denial of certification on July 1, 1994.

Discussion

An employer must make efforts to contact qualified U.S. applicants in a timely fashion after receipt of resumes from the state job service agency. Failure to make timely contact indicates a failure to recruit U.S. workers in good faith. Loma Linda Foods, Inc., 89-INA-289 (Nov. 26, 1991)(*en banc*). Whether an employer made timely contacts turns on how long the employer needs to make a reasonable examination of the applicants' credentials; including whether the job requires extensive or minimal credentials, whether the recruitment is local and the number of persons who applied for the position.

In this case, Employer received the applicant's resumes on April 19, 1993 (AF. 20), prepared recruitment letters to the applicants dated April 21, 1993, which were delivered to applicants Garcia and Shulman on May 13 and 17, 1993, respectively. (AF. 59-60, 63-64) Employer offered no explanation for the three and one-half to four week delay in contacting the applicants. It appears that the job did not require extensive credentials, each resume was one page in length, and Employer prepared recruitment letter within two days after receipt of the resumes (AF. 65, 66, 68). In addition, only three applicants applied for the job and recruitment of the two qualified applicants, Garcia and Shulman, was local. In fact, both applicants worked at the same race track as Employer. Moreover, Ms. Shulman worked a distance of two barns from Employer. (AF. 8)

Under the circumstances we find that Employer's unexplained recruitment delays of three and one-half weeks as to applicant Garcia and four weeks as to applicant Shulman demonstrated a lack of good faith recruitment of qualified U.S. applicants and indicates that the job was not open to any qualified U.S. worker as required by the regulation. 20 CFR § 656.21(b)(6). Recruitment delays discourage applicants who often seek and find other employment in the interim.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED and labor certification is DENIED.

Entered at the Direction of the panel by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.